No. 80-5904

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN R. SITTON, Appellant,

VS

THE STATE OF TEXAS, Appellee.

On Appeal from the County Court at Law No. Two
of Travis County, Texas

MOTION TO DISMISS OR AFFIRM

Margaret Moore
Travis County Attorney
Attorney for Appellee

Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
(512) 478-3415

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement	1
Question Presented	2
Argument	2
1. Lack of a Requirement of a Culpable Mental State Does Not Render the Statute Unconstitutional	2
2. The Statute Does Not Violate Due Process Requirements of Definiteness	3
3. The Texas Law on Prima Facie Evidence Does Not Create a Burden-Shifting Presumption	5
4. The Statute Does Not Violate Substantive Due Process Standards	5
Conclusion	6

TABLE OF AUTHORITIES

CASES:	Page
Eaves v. State, 171 Tex. Crim. 670, 353 S.W.2d 231 (1962)	4
Floeck v. State, 34 Tex.Crim. 314, 30 S.W. 794(1895)	5
Gano v. State of Texas, 466 S.W.2d 730 (1971)	4
Jordan v. DeGeorge, 341 U.S. 223 (1951)	3
Morissette v. United States, 342 U.S. 246 (1952)	2,3
Sandstrom v. Montana, 442 U.S. 510 (1979)	5
Standard Oil Company of New Jersey v. United States, 221 U.S. 1 (1912)	3
State v. Coppes, 247 Iowa 1057, 78 N.W.2d 10 (1956)	3
State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917)	4
Thomas v. State of Texas, 474 S.W.2d 692 (1972)	5
United States v. American Tobacco Company, 221 U.S. 106 (1912)	3

CASES (cont.) Page

United States v. Freed, 401 U.S. 601 (1971) 3

United States v. Petrillo, 332 U.S. 1 (1947) 4

Winters v. New York, 333 U.S. 507 (1948) 4

Zulauf v. State of Texas, 591 S.W.2d 869 (1980) 2

STATUTES:

TEX. REV. CIV. STAT. ANN. Art. 6701d, Sec. 166(a) (VERNON) 1,2

TEX. REV. CIV. STAT. ANN. Art. 6701d, Sec. 22 (VERNON) 1

TREATISE:

Vol 6, A.L.R. 3d 1326 4

No. 80-5904

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN R. SITTON, Appellant,

VS

THE STATE OF TEXAS, Appellee.

On Appeal from the County Court at Law No. Two
of Travis County, Texas

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this honorable Court to dismiss the above entitled appeal on the ground that no substantial federal question is presented, or, in the alternative, to affirm the judgment of the County Court at Law No. Two of Travis County, Texas, on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as no to need further argument.

STATEMENT

Appellant was convicted of speeding under TEX. REV. CIV. STAT. ANN. Art 6701d, Sec. 166(a) (Vernon), in the County Court at Law No. Two of Travis County, Texas. Under Texas law, an offense under this statute is a misdemeanor. TEX. REV. CIV. STAT. ANN. Art. 6701d, Sec. 22 (Vernon). The statute in question provides in pertinent part:

> "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent

under the circumstances then existing. Except when a special hazard exists that requires lower speeds for compliance with paragraph (b) of this section, the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this Section or established as hereinafter authorizes shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Thirty (30) miles per hour in any urban district;..."

****

The evidence adduced at trial showed Appellant had been traveling at approximately 45 miles per hour on a street in an urban district.

QUESTION PRESENTED

WHETHER OR NOT ART. 6701d, Sec. 166(a) IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

1. Lack of a Requirement of a Culpable Mental State Does Not Render the Statute Unconstitutional.

Appellant complains that the statute in question, Art. 6701d, Sec. 166 et seq., TEX. REV. CIV. STAT. ANN. (VERNON), "is unconstitutional because Texas, by legislation requires a culpable state of mind and the Court held that it didn't need one."

Appellee interprets this complaint to mean that the statute, as construed by the trial court, is unconstitutional due to lack of a requirement of a culpable mental state.

The Texas Court of Criminal Appeals, the court of last resort for review of state criminal offenses, in construing the statute in question, held that the legislature intended to and did dispense with a culpable mental state as an element of the offense. Zulauf v. State of Texas, 591 S.W.2d 869,873 (1980). Appellant's contention that lack of such element renders a speeding statute unconstitutional is contrary to the prior cases of this Court.

In Morissette v. United States, 342 U.S. 246 (1952), Justice Jackson discussed the problem of distinguishing between crimes that require a mental element and crimes that do not. In the case he reviewed the evolution of so-called public welfare offenses, and in holding that intent may not be eliminated from criminal offenses incorporated from the common law, suggests that intent may be eliminated from certain public welfare offenses such as violations

of traffic regulations and motor vehicle laws. Morissette v. United States, 342 U.S. at 246-249,n.20.

This position was re-stated in United States v. Freed, 401 U.S. 601 (1971), in which the Court held that while the presence of mens rea has long been a requirement of criminal responsibility, the list of exceptions to that requirement has grown, especially in the expanding regulatory area over activities involving public health, safety, and welfare. United States v. Freed, supra, at 607.

Appellant's position that this Court requires a speeding statute to create an offense which contains the element of intent in order to be constitutional is therefore without merit.

2. The Statute Does Not Violate Due Process Requirements of Definiteness.

Appellant complains that the statute in question is void for vagueness because it sets no standards. Yet the statute does set a standard: to drive at a speed no greater than is reasonable and prudent under the circumstances. The fact that the standard is measured by the words "reasonable and prudent" does not render the statute objectionable upon constitutional grounds.

The test is whether the language conveys sufficient warning as to the proscribed conduct when measured by common understanding and practices. Jordan v. De George, 341 U.S. 223,231 (1951) The words of the statute are simple and their meaning should be well known to operators of motor vehicles, who, by virtue of the requirements of obtaining a license, know or should know what speed is proper and reasonable under different traffic conditions. See State v. Coppes, 247 Iowa 1057, 78 N.W.2d 10 (1956).

Appellant's position is, in effect, that a man should not be held responsible in a criminal offense for knowing what is reasonable. Such a position is unsound. The legislature merely wrote into the statute what has become known as the "rule of reason" ever since Standard Oil Company of New Jersey v. United States, 221 U.S.1 (1912), and United States v. American Tobacco Company, 221 U.S. 106 (1912) were decided by this Court. In these

cases the Court held that the Anti-Trust Act was not a denial of all restraint of trade, but only a denial of unreasonable restraint of trade. It can hardly be suggested that this Court read into the statute something that made it so indefinite and uncertain that it was incapable of advising the public as to what was or was not an offense under it. See State v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917).

Appellant cites as support for his contention that the statute is umpermissibly vague numerous cases of this Court which in fact are not in point. Those cases dealt with statutes which infringed upon First Amendment rights either in their form or in the manner in which they were applied. This Court has stated that it will go far to uphold state or federal statutes which deal with offenses difficult to define when they are not intertwined with limits on free expression. Winters v. New York, 333 U.S. 507 (1948). The offense of speeding is difficult to define because it is virtually impossible to set out specific rates of speed to cover innumerable conceivable conditions of weather, traffic density, pedestrian density, street wear, and so on. Appellee urges that the statute in question is as definite and certain as the subject matter will permit, and is a valid legislative effort to provide a statute sufficiently elastic and adaptable to meet all the dangerous situations presented. The Constitution does not require impossible standards of specificity. See United States v. Petrillo, 332 U.S.1 (1947).

The great weight of authority throughout the United States is in favor of validity in the face of due process challenges of speeding statutes which contain provisions for measuring the legal rate of speed by reasonableness. See 6 A.L.R.3d 1326. When Texas in the case of Eaves v. State, 171 Tex. Crim. 670, 353 S.W.2d 231 held the statute in the case at bar to be constitutionally definite, thirty state legislatures had adopted similar statutes and the Supreme Courts of sixteen of those states had held the statutes constitutional. Gano v. State of Texas, 466 S.W.2d 730, 732 (1971).

Appellant's complaint that the statute violates due process requirements of definiteness is therefore without merit.

3. The Texas Law on Prima Facie Evidence Does Not Create a Burden-Shifting Presumption.

Appellant mistakenly complains that under Texas law, "the presumption of the prima facie speed law is a burden shifting presumption,..." Appellee would like to clarify the position of Texas law regarding prima facie evidence.

A leading Texas case held that prima facie evidence is not a presumption, but is merely proof of the case, upon which a jury may find a verdict, unless rebutted by other evidence, and that making out a prima facie case does not change the burden of proof. Floeck v. State, 34 Tex. Crim. 314, 30 S.W. 794, 797 (1895). Failure to define "prima facie evidence" for a jury is reversible error. Thomas v. State of Texas, 474 S.W.2d 692 (1972). If the jury is not told, as a matter of law, to find a defendant guilty upon such evidence, but is left by the charge free to weigh the prima facie evidence, together with all the other testimony, in connection with the reasonable doubt and presumption of innocence to which a defendant is entitled in every criminal trial, and to render their verdict accordingly, then the jury has been properly charged. Thomas v. State, supra, at 695, Floeck v. State, supra, at 798.

This Court held that if the actual words spoken to the jury would leave a reasonable juror to interpret the instruction as a conclusive presumption or a burden-shifting presumption with regard to intent, either would deprive the defendant to the right to due process of law by violating the requirement of the Fourteenth Amendment that the State prove every element of a criminal offense beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510 (1979).

A comparison of the Texas rule with the rule established by this Court shows there is no conflict. Appellant's complaint on this ground is wholly frivolous.

4. The Statute Does Not Violate Substantive Due Process Standards.

Appellant complains that there is no rational relationship between the evil sought to be curtailed and the infringement of the right. The right in this case is a Texas citizen's natural right to use the public streets. The evil sought to be curtailed is use

of the public streets by motor vehicle operators in such a way as to create a hazard to the public. Appellant's argument that there is no rational relationship between requiring motor vehicle operators drive at speeds reasonable and prudent under the circumstances, and protecting the public, is clearly without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed, or, in the alternative, the judgment of the County Court at Law No. Two, Travis County, Texas, should be affirmed.

Margaret Moore

Margaret Moore
Attorney for Appellee

PROOF OF SERVICE

I, Sally Elizabeth Swanson, a clerk in the office of the County Attorney for Travis County, Texas, Appellee herein, depose and say that on the 14th day of January, 1981, I served a copy of the foregoing Motion to Dismiss or Affirm on John R. Sitton, Appellant herein, by personally delivering same to Carolyn T. Marshall, in the offices of J.P. Darrouzet, counsel of record for said John R. Sitton, located at Suite No. G-10, 812 San Antonio, Austin, Texas, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States.

All parties required to be served have been served.

John R. Sitton, through his attorney,

J. P. Darrouzet, Suite No. G-10, 812 San Antonio

Austin, Texas

Sally Elizabeth Swanson

Sally Elizabeth Swanson

Subscribed and sworn to before me, at 2:05, this 14th day of January, 1981.

Cynthia Hill

CYNTHIA HILL

Travis County, Texas